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9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN JOSE DIVISION
13

14 UNITED STATES OF AMERICA,

15 Plaintiff,

16 v.

17 RAMESH "SUNNY" BALWANI,

18 Defendant.
19

Case No. CR-18-00258-EJD

**DEFENDANT RAMESH "SUNNY"
BALWANI'S MOTION FOR RELEASE
PENDING APPEAL**

Date: February 17, 2023

Time: 9:30 a.m.

CTRM.: 4, 5th Floor

Hon. Edward J. Davila
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NOTICE OF MOTION AND MOTION FOR RELEASE PENDING APPEAL

PLEASE TAKE NOTICE that on February 17, 2023, at 9:30 a.m. or on such other date and time as the Court may order, in Courtroom 4 of the above-captioned Court, located at 280 South First Street, San Jose, CA 95113, before the Honorable Edward J. Davila, Defendant Ramesh “Sunny” Balwani will and hereby does respectfully move the Court for release pending the resolution of all appellate proceedings in this case. The Motion is based on the below Memorandum of Points and Authorities, the Declaration of Mark S. Davies and attached exhibits, the record in this case, and any other matters that the Court deems appropriate.

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1 I. INTRODUCTION

2 Mr. Balwani has now promptly appealed the judgment of conviction, Dkt. 1702, and the
 3 Court should grant him release until the conclusion of the appellate process. This Court has twice
 4 previously concluded that Mr. Balwani does not pose a danger to the safety of any other person or
 5 the community and that, with appropriate conditions, his appearance in these proceedings can be
 6 assured. *See* Dkt. 7, 8 (van Keulen, J.); Dkt. 1511 (Davila, J.). Nothing has changed in this regard;
 7 indeed, Mr. Balwani's consistent appearances and compliance with the conditions of his release
 8 underscore the correctness of the Court's prior findings. *See* 18 U.S.C. § 3143(b)(1)(A).

9 Moreover, Mr. Balwani's appeal will raise substantial questions that, if resolved in his
 10 favor, would likely lead to a new trial or a substantially reduced sentence. *See id.*

11 § 3143(b)(1)(B). At least eight appellate issues in particular warrant release pending appeal:

- 12 1. The constructive amendment of the indictment concerning non-Theranos technology.
- 13 2. The admission of specialized testimony by lay witnesses never qualified as experts.
- 14 3. The solicitation of and failure to correct false testimony from Bryan Tolbert.
- 15 4. The denial of the motion to suppress and adverse instruction concerning LIS.
- 16 5. The refusal of questioning concerning the bias of Adam Rosendorff.
- 17 6. The denial of a hearing and new trial concerning Dr. Rosendorff's post-trial conduct.
- 18 7. The admission of evidence of alleged misrepresentations to the Department of Defense.
- 19 8. The application of the wrong standard of proof in calculating loss at sentencing.

20 Because each of the governing factors is satisfied, the Court should grant this motion and
 21 order Mr. Balwani's release pending resolution of all appellate proceedings in this case. If the
 22 Court does not issue a ruling on this motion before Mr. Balwani's Bureau of Prisons reporting
 23 date of March 15, 2023, the Court should also stay that reporting date until this Court is able to
 24 rule—or, if the motion is denied, until the Court of Appeals can rule.

25 II. BACKGROUND

26 Mr. Balwani and his co-defendant, Elizabeth Holmes, were originally charged by
 27 indictment on June 14, 2018. Dkt. 1. Mr. Balwani was arraigned the following day. Dkts. 7, 12.
 28 At the arraignment, on the government's recommendation, Judge van Keulen granted

1 Mr. Balwani pretrial release on an unsecured \$500,000 bond with usual conditions. Dkts. 7, 8, 12.

2 On May 20, 2020, the government stipulated that Mr. Balwani had “been in full
3 compliance with the conditions of his release.” Dkt. 402, at 1. On that basis, the parties stipulated,
4 Pretrial Services approved, and Judge van Keulen ordered the release of Mr. Balwani’s passport
5 for international travel. *Id.* at 2-5. When those travel plans were cancelled because of COVID-19
6 pandemic travel restrictions in the foreign country, Mr. Balwani returned his passport to Pretrial
7 Services pursuant to a stipulation with the government. Dkt. 557.

8 Following trial, the jury found Mr. Balwani guilty on all counts on July 7, 2022.
9 Dkt. 1507. On July 14, the Court maintained Mr. Balwani’s release pending sentencing and
10 modified the conditions to include a \$750,000 secured bond. Dkt. 1511. Mr. Balwani satisfied the
11 modified bond condition on July 19. Dkt. 1513. As the government stated while discussing
12 release pending sentencing, Mr. Balwani has demonstrated a “history of compliance” “during the
13 multiple years under pretrial supervision.” Tr. 7785. The Court likewise approved of
14 Mr. Balwani’s “satisfactory performance on pretrial services.” Tr. 7787. Mr. Balwani’s perfect
15 compliance has continued “at all times” throughout his release pretrial and pending sentencing.
16 Dkt. 1647 (PSR), ¶ 6; *accord id.* Sentencing Recommendation, at 3.

17 On December 7, 2022, the Court sentenced Mr. Balwani to a 155-month term of
18 imprisonment and three years of supervised release on each count of conviction, to be served
19 concurrently. Dkt. 1682, at 1. The Court determined that the terms of Mr. Balwani’s release
20 would “remain in effect until” his surrender date—March 15, 2023. *Id.* On December 20, 2022,
21 Mr. Balwani filed his notice of appeal to the Ninth Circuit. Dkt. 1702.

22 **III. ARGUMENT**

23 Section 3143 is mandatory: the Court “shall order the release” of a defendant pending
24 appeal so long as four factors are satisfied. 18 U.S.C. § 3143(b)(1). Here, they are satisfied:

- 25 1. The defendant is not likely to flee or pose a danger to the safety of any other
- 26 person or the community if released.
- 27 2. The appeal is not for purpose of delay.
- 28 3. The appeal raises a substantial question of law or fact.

4. If the determination of the substantial question is favorable to the defendant, it is likely to result in reversal, a new trial, a non-custodial sentence, or a reduced sentence shorter than the expected duration of the appellate process.

See 18 U.S.C. § 3143(b)(1)(A)-(B); *United States v. Handy*, 761 F.2d 1279, 1283 (9th Cir. 1985).

A. Mr. Balwani Is Not Likely To Flee Or Pose Any Danger.

There is no risk that Mr. Balwani will flee while pursuing his appeal, much less a *likelihood* of it as required to deny release on that basis. 18 U.S.C. § 3143(b)(1)(A). The Probation Officer reached the same conclusion. PSR Sentencing Recommendation, at 3 (“The defendant has kept all court appearances, complied with conditions of pretrial release, and is not viewed as a flight risk....”).

Mr. Balwani is a U.S. citizen and does not hold citizenship in any other nation. PSR, at 3. His passport is currently in the custody of Pretrial Services. Tr. 7786; Dkt. 558. He has complied strictly with the travel conditions of his current release, including making the appropriate motions in this Court when seeking adjustments to those conditions. *See, e.g.*, Dkts. 398, 401, 1693. Mr. Balwani has substantial ties to the United States, including two brothers, nieces, and nephews who reside in California, Maryland, and Ohio and who have consistently provided him with support during these proceedings and will continue to do so. *See* PSR, ¶¶ 88, 100; Dkt. 1622-2, at 1; 12/7/22 Sentencing Tr. 141-42, 151. And as described in a letter of support submitted at sentencing, Mr. Balwani is a cherished member of local religious communities, volunteering “every weekend” with an “unshakable commitment” to the families in these communities. Dkt. 1667-1, at 151; *see also* PSR, ¶ 98; 12/7/22 Sentencing Tr. 142. There is, accordingly, no risk he will flee if granted release pending appeal.¹ Any possible concern about Mr. Balwani’s foreign birth and familial ties is far outweighed by his perfect compliance with the Court’s release

¹ *E.g., United States v. Cuong Cau Dang*, No. 13-cr-486-EJD (PSG), 2013 WL 4119426, at *3 (N.D. Cal. Aug. 9, 2013) (“[I]f Dang did not run and cannot be shown to have harmed anyone, especially Cisco, even months after he learned he was the target of an investigation, how can the court say now that there is an undue risk that Dang suddenly would change course despite the explicit court order to refrain from doing so?”).

orders to date and his long-established roots in the United States, including his stateside family.²

There is similarly no likelihood that Mr. Balwani will pose a danger to the safety of any person or the community. 18 U.S.C. § 3143(b)(1)(A). The Probation Officer reached the same conclusion. PSR, Sentencing Recommendation, at 3 (“The defendant ... is not viewed as a ... danger to the community.”); *see also* 12/7/22 Sentencing Tr. 150 (“[T]his was a nonviolent offense, and ... Mr. Balwani presents no history of violence.”); Dkt. 1682, at 1. Mr. Balwani has never been accused of or arrested for any other crime, much less a dangerous one. 12/7/22 Sentencing Tr. 150; Dkt. 1682, at 1; PSR, ¶¶ 81-86. Defendants of Mr. Balwani’s age have dramatically decreased recidivism rates, as do defendants convicted of fraud. U.S. Sentencing Comm’n, *The Effects of Aging on Recidivism Among Federal Offenders* 3 (2017), <https://perma.cc/375D-BVJR>. Indeed, in granting release pending trial and sentencing, the Court and government have now twice agreed that Mr. Balwani poses no danger. The imposition of a sentence does not change the outcome of that analysis, as the Court recognized in maintaining release pending surrender. Dkt. 1682, at 1.

B. Mr. Balwani’s Appeal Is Not For Purpose Of Delay.

Mr. Balwani intends to pursue a variety of errors on appeal, including but not necessarily limited to the substantial legal questions described below. Counsel for Mr. Balwani has attested to the good faith of the appeal, Davies Decl. ¶ 2, which can be enough to “satisf[y]” the Court’s delay inquiry, *Blassingame v. United States*, 242 F.2d 313, 314 (9th Cir. 1957) (per curiam).

Mr. Balwani is pursuing his appeal in good faith and not for delay. Indeed, at Mr. Balwani’s election, his notice of appeal was submitted before judgment has even been entered, in advance of the deadline, which commences briefing in the Court of Appeals weeks earlier than required—the opposite of a delay tactic. *See* Dkt. 1705-1 (Time Schedule Order). The vast majority of the delays in this case to date have been the direct result of delays in and the length of Ms. Holmes’ trial, as well as the COVID-19 pandemic, not decisions by Mr. Balwani.

² *Id.* at *4 (“Since his arrival in this country decades ago, Dang has spent his entire life with his immediate family in the San Jose Division of this district. ... [B]ecause his life is tethered to the United States, and not Vietnam, this factor still weighs against detention.”); *see also United States v. Motamedi*, 767 F.2d 1403, 1408-09 (9th Cir. 1985) (reversing denial of pretrial release despite foreign connections in light of ties to the United States).

1 *See, e.g.*, Dkt. 514, at 6-8; Dkt. 1198; *Leigh v. United States*, 82 S. Ct. 994, 997 (1962) (Warren,
2 C.J., in chambers) (considering whether “such delays as have occurred can ... be attributed to
3 applicant”). In fact, if the trials had proceeded as Mr. Balwani requested, he would have been
4 tried before Ms. Holmes, months earlier than transpired. *See* Dkt. 189. There is, accordingly, no
5 evidence that Mr. Balwani is engaging in delay tactics rather than pursuing a good-faith appeal.³

6 **C. Mr. Balwani’s Appeal Presents Substantial Questions.**

7 Mr. Balwani’s conviction is a result of numerous legal and factual errors warranting
8 acquittal or a new trial. This motion discusses eight of the substantial questions presented by this
9 matter that Mr. Balwani may raise on appeal. This Court should grant release pending appeal in
10 light of those substantial questions. In the Ninth Circuit, “a ‘substantial question’ is one that is
11 ‘fairly debatable.’” *Handy*, 761 F.2d at 1281. To satisfy this prong, a defendant need show “only
12 a non-frivolous issue.” *United States v. Garcia*, 340 F.3d 1013, 1020 n.5 (9th Cir. 2003).

13 The Court’s task is to “decide whether there is a school of thought, a philosophical view, a
14 technical argument, an analogy, an appeal to precedent or to reason commanding respect that
15 *might possibly* prevail.” *Herzog v. United States*, 75 S. Ct. 349, 351 (1955) (Douglas, J., in
16 chambers) (emphasis added), *quoted in Handy*, 761 F.2d at 1281.⁴ The Ninth Circuit has set this
17 bar intentionally lower than the “close question” standard adopted by other circuits. *See Handy*,
18 761 F.2d at 1281-82, 1282 n.2; Doug Keller, *Resolving a “Substantial Question,”* 60 Fla. L. Rev.
19 825, 827-28 (2008) (describing this difference). Under this Circuit’s precedent, then, a substantial
20 question need not be a close one—just fairly debatable.

21 A district court need not agree that there was error: “The question may be ‘substantial’
22 even though the judge or justice hearing the application for bail would affirm on the merits of the

23 ³ *See, e.g., United States v. Baras*, No. CR 11-00523-YGR, 2014 WL 4728992, at *4 n.3 (N.D.
24 Cal. Sept. 18, 2014) (“[B]ecause there is nothing in the record suggesting that Defendant filed an
25 appeal for purposes of delay, there is no basis to deny Defendant’s motion on this ground.”);
26 *United States v. Ohayon*, No. CR 10-00105 CRB, 2014 WL 2159256, at *2 n.1 (N.D. Cal. May
23, 2014) (“Although Defendant no doubt wishes to postpone his incarceration, the Court cannot
24 say that it is this desire, rather than a sincere (although, in the Court’s view, misguided) view of
25 the merits of his appeal, that motivated his filing.”).

27 ⁴ Although the bail rules and statutes have changed over the years, the Ninth Circuit in *Handy*
28 adopted the longstanding interpretation of “substantial question” described by Justice Douglas.
761 F.2d at 1282 (adopting the “historic meaning” even though historical cases “involve[d]
earlier rules or statutes or arose in different contexts”).

1 appeal.” *D’Aquino v. United States*, 180 F.2d 271, 272 (Douglas, Circuit Justice, 9th Cir. 1950),
 2 *quoted in Handy*, 761 F.2d at 1281; *accord Herzog*, 75 S. Ct. at 351 (finding a substantial
 3 question even though the Justice “reach[ed] the conclusion that on the merits there is no appellate
 4 judge who would likely reverse the judgment”). Even in cases where district judges are confident
 5 in their rulings, appellate courts may disagree where questions are fairly debatable.⁵ Nor must a
 6 district court agree that a defendant is innocent in order to grant release: “The question of the guilt
 7 or innocence of an appellant is not an issue on application for bail.” *D’Aquino*, 180 F.2d at 272.
 8 So long as the defendant raises at least one fairly debatable question, this prong is satisfied.⁶

9 **1. The Constructive Amendment Of The Indictment Is A Substantial** 10 **Question.**

11 Mr. Balwani moved in limine to exclude evidence concerning the accuracy and reliability
 12 of traditional, commercial blood-testing technology used by Theranos. Dkt. 1156, at 1-11. The
 13 Court denied the motion. Dkt. 1326, at 7-8. The Court’s ruling, and the subsequent admission of
 14 that evidence, constructively amended the indictment and allowed Mr. Balwani to be convicted
 15 on allegations never approved by the grand jury. *See Stirone v. United States*, 361 U.S. 212, 213-
 16 17 (1960). Questions of constructive amendment are reviewed de novo. *United States v. Bhagat*,
 17 436 F.3d 1140, 1145 (9th Cir. 2006).

18 There are two distinct categories of factual issues that could have been put to the grand
 19 jury. First, when Theranos conducted testing using proprietary Theranos technology, did it
 20 produce accurate and reliable results when compared to commercially available devices, and did

21 ⁵ *See, e.g., United States v. Geringer*, No. 5:12-cr-00888-EJD, 2016 WL 4791815 (N.D. Cal.
 22 Sept. 14, 2016) (finding no substantial question as to loss calculation), *sentence vacated and*
 23 *remanded*, 672 F. App’x 651 (9th Cir. 2016) (vacating based on erroneous loss calculation);
United States v. Abad, No. CR 12-54 4 JSW, 2014 WL 12708710, at *2 (N.D. Cal. Aug. 6, 2014)
 (granting release pending appeal in healthcare fraud case even though the district court had
 “considered and rejected” all of the arguments raised in the motion for release).

24 ⁶ *See United States v. Martin*, No. 1:13-cr-00065-BLW, 2014 WL 2155187, at *2 (D. Idaho May
 25 22, 2014) (finding that “the vast majority of the issues [raised in the motion] do not present a
 26 substantial question, ... [b]ut one or two do, and this is all [the defendant] needs to be eligible for
 27 release pending appeal”); *see also United States v. Pollock*, No. 3:14-cr-00186-BR, 2016 WL
 28 8730144, at *2 (D. Or. Sept. 16, 2016) (granting release pending appeal where the defendant
 raised a substantial question about the loss amount and whether it could be reliably calculated for
 sentencing purposes); *United States v. Fisher*, No. SACR 14-00110-JLS-2, 2015 WL 13122782,
 at *2 (C.D. Cal. Aug. 17, 2015) (granting release pending appeal in fraud case where the
 defendant raised a substantial question about the district court’s admission of a non-testifying co-
 defendant’s statements through a testifying witness).

1 defendants make misrepresentations on this topic? Or second, when Theranos conducted testing
 2 on the same unmodified commercial devices used by other labs, did it produce less accurate and
 3 reliable results than traditional labs, and did defendants make misrepresentations on this topic?

4 The Third Superseding Indictment (“TSI,” Dkt. 469) invokes only the first of those
 5 categories. But, over Mr. Balwani’s protest, the government introduced evidence about and
 6 argued for conviction based on the second category, too. In other words, the government’s case
 7 and the Court’s rulings constructively amended the TSI by “alter[ing], either literally or in effect”
 8 its “charging terms ... after the grand jury has last passed upon them.” *United States v. Adamson*,
 9 291 F.3d 606, 614 (9th Cir. 2002) (quoting *United States v. Von Stoll*, 726 F.2d 584, 586 (9th Cir.
 10 1984)). It is at least fairly debatable whether the Court’s expansion of the case to reach that
 11 distinct second category literally or effectively altered the TSI’s terms.

12 One hallmark of a constructive amendment is a trial that includes a “complex of facts”
 13 that is “distinctly different from those set forth in the charging instrument.” *Id.* at 615. Here, the
 14 indictment alleged one complex of facts (Theranos technology), but at trial the government
 15 presented another (unmodified commercial devices). And this distinct difference cut across
 16 multiple aspects of the case—from the testimony of CMS Inspector Sarah Bennett, who was
 17 allowed to testify about regulatory deficiencies related to Theranos’ use of ordinary commercial
 18 devices, to the CMS report that set forth alleged regulatory violations (including an immediate
 19 jeopardy finding) corresponding mainly to non-Theranos devices, and to the testimony of two
 20 patients (each counts in the TSI), who were allowed to describe allegedly erroneous or
 21 unexpected test results they received without any connection to Theranos’ proprietary technology.

22 When assessing a constructive amendment claim, courts start with the indictment’s text,
 23 reading it “according to common sense with an appreciation of existing realities.” *United States v.*
 24 *Anderson*, 532 F.2d 1218, 1222 (9th Cir. 1976). With respect to both the patient counts and the
 25 investor counts, the TSI alleges schemes to defraud concerning the systemic reliability of
 26 Theranos’ proprietary fingerstick testing technology. It repeatedly refers to whether the
 27 defendants “knew ... that *Theranos’s technology* was, in fact, not capable of consistently
 28

1 producing accurate and reliable results.” Dkt. 469 (“TSI”), ¶ 16 (emphasis added).⁷ It nowhere
 2 alleges fraud concerning inaccurate results from commercially available tests.

3 Until the Court’s written order on Mr. Balwani’s motions in limine, years after the grand
 4 jury returned the operative indictment, the parties and the Court appeared to agree on this
 5 common-sense reading of the allegations. The government put it simply and correctly in one of its
 6 motions in limine: Tests not “run on [a] Theranos proprietary blood analyzer [but rather] a regular
 7 FDA-approved machine” are irrelevant and “should be precluded under Rules 401 and 403.”
 8 Dkt. 1155, at 20. Indeed, at the hearing, the Court agreed: “I understand that he’s not ... charged
 9 with doing anything with commercial machines. He’s certainly not charged with that.... I would
 10 probably grant [a directed verdict] if they didn’t put anything in about the company’s machines
 11 *like they said in the indictment.*” Feb. 4, 2022 Hr’g Tr. 32 (emphasis added).

12 In its written order that followed, however, the Court took the polar opposite view,
 13 concluding that the TSI “puts Balwani on notice that the scheme to defraud patients includes
 14 Theranos’ use of unmodified conventional analyzers.” Dkt. 1326, at 8. The Court acknowledged
 15 that “the TSI does at times focus exclusively on ‘Theranos technology.’” *Id.* But it stretched
 16 supposed ambiguities in the indictment to reach the accuracy of unmodified commercial devices.
 17 It parsed phrases in a highly technical manner, reasoning that “Theranos test results” referred to
 18 results from Theranos *as a company*, even though the parties and the Court for years had
 19 understood that phrase to refer to results generated by Theranos *technology*. *Id.* (citing TSI ¶ 18).
 20 That reading defies the indictment’s plain meaning, which uses “Theranos” as a modifier to
 21 indicate Theranos’ proprietary technology.

22 An indictment can be read only to reach facts “necessarily implied by the allegations,” and
 23 nothing in this indictment *necessarily* implies the broader interpretation ultimately adopted by the

24 ⁷ See also *id.* ¶ 5 (“Theranos pursued the development of proprietary technology....”); *id.* ¶ 6
 25 (“Theranos claimed that its proprietary technology and methods would minimize the risk of
 26 human error and generate results with the highest accuracy.”); *id.* ¶ 8 (“[M]ade statements to the
 27 media advertising the capabilities of Theranos’s technology.”); *id.* ¶ 12(E) (“[R]epresented to
 28 investors ... that Theranos’s technology had deployed to the battlefield....”); *id.* ¶ 12(H)
 (“[R]epresented to investors that Theranos’s technology had been examined, used, and
 validated....”); *id.* ¶ 17(C) (“[K]new that the tests performed on Theranos technology contained
 or were likely to contain: (1) inaccurate and unreliable results....”); *id.* ¶ 22 (“[T]he false and
 fraudulent pretense that Theranos technology produced reliable and accurate blood test results.”).

1 Court in its motion in limine ruling. *Id.* at 7 (quoting *Anderson*, 532 F.2d at 1222).⁸

2 The erroneous expansion of the indictment requires reversal. The Fifth Amendment grants
3 defendants “a substantial right to be tried only on the charges set forth in an indictment by a grand
4 jury,” *United States v. Shipsey*, 190 F.3d 1081, 1085 (9th Cir. 1999) (vacating conviction), and
5 even more important, the grand jury “serv[es] as a kind of buffer or referee between the
6 government and the people,” *United States v. William*, 504 U.S. 36 (1992). For these reasons, a
7 constructive amendment “always requires reversal.” *Adamson*, 291 F.3d at 615; *see also United*
8 *States v. Dipentino*, 242 F.3d 1090 (9th Cir. 2001) (acknowledging that a constructive amendment
9 may “always require[] reversal,” but not reaching the issue because “the defendants were
10 prejudiced” regardless). Since *Stirone*, the Supreme Court, the Ninth Circuit, and other circuits
11 have often reversed convictions where the jury may have convicted based on a charge that the
12 grand jury did not make.⁹

13 Moreover, the erroneous expansion of the indictment caused significant prejudice by
14 allowing the government to introduce substantial—and highly incendiary—evidence that was
15 relevant only to an uncharged allegation (i.e., that Theranos was unable to produce accurate and
16 reliable results using commercially available technology and that Mr. Balwani knew it). For
17 example, CMS surveyor Sarah Bennett was allowed to testify about CMS’s findings of regulatory
18 deficiencies, the overwhelming majority of which concerned tests run on commercial devices,

19
20 ⁸ References in the indictment to HIV testing do not show that the grand jury indicted on a theory
21 of fraud grounded in the accuracy of standard commercial testing. The record shows that the
22 government was mistaken about which tests were run on which devices and thought at the time
23 that Theranos had conducted HIV testing on Theranos devices. *See* Dkt. 265, at 3 (contending
24 that “Theranos’s analyzer” “was not capable of consistently producing accurate and reliable
25 results for ... HIV”); Dkt. 267, at 2 (similar).

26 ⁹ *See e.g. Russell v. United States*, 369 U.S. 749, 770 (1962) (“To allow the prosecutor, or the
27 court, to make a subsequent guess as to what was in the minds of the grand jury at the time they
28 returned the indictment would deprive the defendant of a basic protection which the guaranty of
the intervention of a grand jury was designed to secure.”); *United States v. Shipsey*, 190 F.3d
1081, 1086 (9th Cir. 1999) (charge of theft by false pretenses, jury could have convicted on
wrongful taking; conviction reversed); *United States v. Dipentino*, 242 F.3d 1090 (9th Cir. 2001)
(charge of leaving asbestos-containing debris on floor to dry, jury could have convicted for
knowingly failing to comply with workplace standard; conviction reversed); *United States v.*
Davis, 854 F.3d 601, 605 (9th Cir. 2017) (sex trafficking charge included knowing disregard of
age of victim, sex trafficking based on reasonable opportunity to observe victim; conviction
reversed); *United States v. Floresca*, 38 F.3d 706 (4th Cir. 1994) (en banc) (reversing conviction
for witness tampering where could have been convicted for tampering with investigation).

1 including the PT/INR test that gave rise to an inflammatory finding that Theranos' practices
 2 posed "immediate jeopardy" to patient health. *See* Tr. 4621, 4660-64, 4965-66, 5030-31. The
 3 Court also erroneously admitted portions of CMS's official report that documented regulatory
 4 violations relating to only commercial technology. And the Court's ruling ushered in evidence
 5 about patient Erin Tompkin's HIV tests, which were run exclusively on unmodified commercial
 6 devices, and patient Brent Bingham's platelet-count tests, which the government did not show
 7 were performed on Theranos technology. *See* Tr. 5953-56, 5977-91. Nor is there evidence that the
 8 government ever informed the grand jury that Ms. Tompkins was tested on FDA-cleared
 9 technology and that it could not show that Mr. Bingham was tested on Theranos' proprietary
 10 technology. *See* Davies Decl. Ex. 1 (7/14/2020 C. McCollow Grand Jury Testimony), at 135-39.

11 These errors infected all the counts of conviction, each of which concerned, at its core, the
 12 accuracy and reliability of Theranos' blood tests. In its closing argument, the government framed
 13 both the investor counts and patient counts in terms of Theranos' ability to run accurate blood
 14 tests.¹⁰ But the government did not clarify that, in accord with the indictment, Theranos' ability to
 15 test accurately had to be based solely on evidence related to Theranos' proprietary technology.

16 The government thus invited the jury to conclude that because of problems related to
 17 ordinary commercial technology, Theranos could not test accurately, as the defendants had
 18 represented to both investors and patients. *See, e.g.*, Tr. 7670 (inviting the jury to "think about the
 19 CMS findings based on a holistic look at the Theranos lab"); Tr. 7681-84 (inviting the jury to
 20 "ask how would Mr. Balwani's actions and choices have been different ... if he was not a
 21 participant in these two schemes...?" and answering in part: "When the CMS inspection found
 22 serious problems in the Theranos lab, Mr. Balwani would have focused on solutions rather than
 23 trying to persuade Sarah Bennett not to call it what she saw it."). It was error to allow the petit
 24 jury to convict on a theory that appears nowhere in the indictment.

25
 26 ¹⁰ *See, e.g.*, Tr. 7061 (arguing to the jury that "investors thought they were investing in a company
 27 that could test accurately" and "patients thought they were getting their blood tested in a company
 28 that could test accurately"); Tr. 7037 ("Just like an article in the media would talk about
 Theranos's accuracy, and that would be useful for an investor to hear, a patient would read in the
 media that Theranos's testing was accurate and also make a decision to use Theranos as a lab or
 blood testing service...."); Tr. 7038 (similar).

1 To be clear, this Court need not conclude that there was error in order to grant this motion.
 2 Release pending appeal is warranted if reasonable judges, faced with an indictment that at least
 3 “at times focus[es] exclusively” on Theranos technology, could conclude on de novo review that
 4 the grand jury’s charges indeed had that exclusive focus. Dkt. 1326, at 8. Because that question is
 5 at least fairly debatable, Mr. Balwani’s appeal raises a substantial question.

6 **2. The Admissibility Of Specialized Testimony By Non-Experts Is A**
 7 **Substantial Question.**

8 Throughout trial, over Mr. Balwani’s objections, the Court allowed lay witnesses to
 9 present scientific, technical, and specialized testimony without first qualifying them as experts.
 10 Those admissibility rulings directly contravened Federal Rule of Evidence 701(c), which
 11 constrains lay witnesses from offering testimony that is “based on scientific, technical, or other
 12 specialized knowledge within the scope of Rule 702.” Consistent with that constraint, Rule 702
 13 permits witnesses to convey “scientific, technical, or other specialized knowledge” only if that
 14 witness “is qualified as an expert” and if the testimony otherwise conforms to that rule’s four
 15 requirements of usefulness, factual basis, reliable methods, and reliable application.

16 Recognizing that courts had allowed the lay-expert line to blur, the advisory committee
 17 reinforced Rule 701 by adding the just-quoted subsection (c) in order “to eliminate the risk that
 18 the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of
 19 proffering an expert in lay witness clothing.” Fed. R. Evid. 701 advisory committee note to 2000
 20 amendment (citing *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997)).

21 The Court of Appeals will review de novo this Court’s interpretation of these rules and its
 22 determination whether the testimony in question falls within their scope. *United States v. Wells*,
 23 879 F.3d 900, 914 (9th Cir. 2018). Mr. Balwani respectfully submits that it is fairly debatable
 24 whether the Court erred in applying Rules 701 and 702 to the testimony of three key government
 25 witnesses: Erika Cheung, Mark Pandori, and Adam Rosendorff. Each of these critical witnesses
 26 repeatedly crossed the line between lay and specialized testimony:

- 27 ■ Ms. Cheung testified about why dilution is necessary in blood testing, Tr. 1132-33;
 28 the capacities of Theranos devices, Tr. 1135-38; the purpose of and concerns arising
 from Theranos’ quality-control testing, Tr. 1202-03, 1245-48; comparisons between

1 Theranos' data-analysis procedures and an industry-standards manual she had never
 2 seen before, Tr. 1552-54; and the purpose of government regulations governing
 blood testing, Tr. 1557-58.

- 3 ■ Dr. Pandori testified about whether Theranos' technology was groundbreaking in
 4 light of the state of the art and industry knowledge, Tr. 1608, 1733; concerns arising
 5 from quality-control and proficiency testing, Tr. 1634, 2274-75; and a critical issue,
 i.e., whether "Theranos testing was more accurate" than competitors', Tr. 1734.
- 6 ■ Dr. Rosendorff testified about the effects of laboratory bias, dilution, and hemolysis
 7 on the accuracy and reliability of Theranos' technology, Tr. 3265-66, 3729-31;
 8 concerns arising from Theranos' use of testing reference ranges specific to its
 9 fingerstick technology, Tr. 3266-67; and whether purported errors in individual
 patients' results could indicate systemic accuracy problems, Tr. 3268-69.

10 The Court allowed this specialized testimony, notwithstanding Rule 702's unsatisfied
 11 safeguards, because the witnesses testified "based on [their] training and experience" at Theranos.
 12 Tr. 1137. But that is precisely what Ninth Circuit precedent forbids. Questions framed "based
 13 upon your training and experience" are a hallmark of Rule 702 expert testimony. *Figueroa-Lopez*,
 14 125 F.3d at 1246; *see also United States v. Conn*, 297 F.3d 548, 554 (7th Cir. 2002). The
 15 testimony described above was "beyond the understanding of an average juror" and, therefore,
 16 specialized. *United States v. Wilson*, 605 F.3d 985, 1026 (D.C. Cir. 2010) (per curiam). In
 17 allowing lay testimony based on specialized knowledge obtained through training and experience,
 18 the Court committed the very error described in *Figueroa-Lopez*.

19 It does not matter that the testimony was based on a witness's own perception: "The mere
 20 percipience of a witness to the facts on which he wishes to tender an opinion does not trump
 21 Rule 702." *Figueroa-Lopez*, 125 F.3d at 1246. Nor does it matter that a witness gained her
 22 specialized knowledge on the job—it is still specialized. Indeed, where knowledge is developed
 23 by learning on the job, it is by nature expert testimony. *See Rodriguez v. Gen. Dynamics*
 24 *Armament & Tech. Prods.*, 510 F. App'x 675, 676 (9th Cir. 2013).

25 This was, in short, testimony "that an untrained layman could not make if perceiving the
 26 same acts or events." *United States v. Peoples*, 250 F.3d 630, 341 (8th Cir. 2001) (citing
 27 *Figureoa-Lopez*); *accord Conn*, 297 F.3d at 554. For example, an untrained layman would not be
 28 familiar with the term "hemolysis," much less be able to explain that there is "a large amount of

1 hemoglobin in red blood cells” that can “interfere[] with the ability of the [blood-testing] readers
 2 to read what is in the sample” and therefore “have an[] effect on the accuracy and reliability of
 3 certain [Theranos] tests.” Tr. 3731 (Rosendorff). At the very least, reasonable judges could fairly
 4 debate whether untrained laymen have such a sophisticated understanding of hemolysis.

5 If the Court of Appeals sees error, it will likewise find prejudice. The government offered
 6 no expert testimony on blood-testing technology in this case. Instead, it relied exclusively on this
 7 specialized testimony from witnesses never qualified to give it. Worse still, these witnesses
 8 repeatedly testified—in a specialized manner—about an ultimate issue: the accuracy and
 9 reliability of Theranos technology. *See* Tr. 1203-03, 1245-48 (Cheung); Tr. 1634, 1734, 2274-75
 10 (Pandori); Tr. 3265-69, 3729-31 (Rosendorff). Indeed, it was precisely these three witnesses who
 11 undergirded the denial of Mr. Balwani’s motion for judgment of acquittal. *See* Dkt. 1635, at 5-7.
 12 And it was precisely these three witnesses the government named when arguing to the jury about
 13 “the accuracy and reliability of [Theranos] blood testing.” Tr. 6939; *accord* Tr. 7054-55, 7084-86;
 14 Tr. 7576 (“The simplest evidence on [accuracy and reliability] was testimony from at least three
 15 individuals who worked within Theranos working in the lab. That was, of course, Erika Cheung
 16 and then Drs. Mark Pandori and Adam Rosendorff.”).

17 As with the constructive-amendment question, the Rule 701 violations here undermine all
 18 counts, both patient and investor. As explained above (at 7-8 & n.7), allegations of
 19 misrepresentations about the accuracy and reliability of Theranos’ technology were at the core of
 20 each count. And as just noted, these three witnesses testified about exactly that. Without that
 21 extensive specialized testimony, a jury could easily have concluded that the government failed in
 22 its burden to prove the accuracy and reliability allegations underlying the investor counts, TSI
 23 ¶ 12(A), and the patient counts, TSI ¶ 17(C).

24 In sum, at the very least, Mr. Balwani’s appeal will present a fairly debatable question
 25 about the Court’s application of Rules 701 and 702 in light of *Figueroa-Lopez*. Some judges
 26 might agree with this Court’s ruling, but on de novo review, some reasonable judges surely would
 27 take the other view. *Figueroa-Lopez*, 125 F.3d at 1246. Accordingly, this evidentiary issue
 28 presents a substantial question warranting release pending appeal.

1 **3. The Prosecutor’s Solicitation Of And Failure To Correct Mr. Tolbert’s**
 2 **False Testimony Raises A Substantial Question.**

3 The Supreme Court has “long emphasized ‘the special role played by the American
 4 prosecutor in the search for truth in criminal trials.’” *Hayes v. Brown*, 399 F.3d 972, 978 (9th Cir.
 5 2005) (en banc) (quoting *Strickler v. Greene*, 527 U.S. 263, 281 (1999)). “Deliberate deception”
 6 of a jury is “inconsistent with the rudimentary demands of justice.” *Hayes*, 399 F.3d at 983
 7 (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)). A conviction “obtained through use of
 8 false evidence, known to be such by representatives of the State, must fall under the Fourteenth
 9 Amendment.” *Napue v. Illinois*, 360 U.S. 264, 269 (1959). The “same result obtains when the
 10 State, although not soliciting false evidence, allows it to go uncorrected when it appears.” *Id.* And
 11 where “credibility” of a witness is “an important issue in the case,” deception by the prosecutor
 12 that protects the witness’s credibility violates “the due process requirements enunciated in *Napue*
 13 and other cases.” *Giglio v. United States*, 405 U.S. 150, 154-55 (1972). Prosecutorial misconduct
 14 of this kind requires reversal of a conviction if the government knowingly relies on false
 15 testimony and that testimony was material, i.e., “there is a reasonable likelihood that the false
 16 testimony could have affected the judgment.” *Dow v. Virga*, 729 F.3d 1041, 1048 (9th Cir. 2013).

17 Due to the government’s deceptive handling of Mr. Tolbert’s testimony, Mr. Balwani did
 18 not receive even rudimentary justice. At Ms. Holmes’ trial, the prosecution played several clips of
 19 a tape recording made by Mr. Tolbert of an investor call led by Ms. Holmes in December 2013.
 20 Holmes Trial Tr. 4471. As a result, while Mr. Tolbert testified as to his “understanding” of what
 21 Ms. Holmes told investors on that call on issues ranging from Theranos devices on medevacs to
 22 pharmaceutical partnerships, *e.g., id.* at 4513, 4514, the jury heard exactly what Ms. Holmes said
 23 during the call. Although the government expected the tape recording to make Mr. Tolbert’s
 24 testimony more powerful for the jury, the tape undermined it. He was forced to admit the tape
 25 showed Ms. Holmes never made certain statements that allegedly informed his view of the
 26 company; she did not claim “there were thousands of tests that could be run” on Theranos
 27 devices, *id.* at 4540, or that its pharmaceutical business “was still, in December of 2013, a
 28 significant focus,” *id.* at 4495; *compare id.* at 4533-37. And when the government made her

1 alleged statements about Theranos devices on military medevacs a centerpiece of its closing
 2 argument, *e.g.*, *id.* at 8910, 8922, 8968, defense counsel was able to direct the jury to “compare
 3 [the tape] to what was actually going on with Theranos’s military programs,” *id.* at 9157—a
 4 comparison that showed Ms. Holmes did not in fact tell investors that Theranos devices were
 5 being used on medevacs as “many of the witnesses” had suggested, *id.* at 9162; *see also id.*
 6 at 4504. After listening to the relevant portion of the tape three different times (on Tolbert’s direct
 7 and cross examinations, and again at the jury’s request during deliberations), the jury did not
 8 convict Ms. Holmes on the counts most directly tied to the December 2013 call.

9 More focused on conviction than truth, in Mr. Balwani’s trial the government decided not
 10 to introduce the tape of the December 2013 investor call. Tr. 4435-39. Instead, the government
 11 successfully opposed the defense’s efforts to introduce it, yet the government still elicited
 12 inaccurate testimony from Mr. Tolbert, including that Holmes claimed “that Theranos devices
 13 were employed on the medevac helicopters and being used to kind of improve survival rates of
 14 military personnel who had been injured in combat.” Tr. 4435. While this was not apparent to the
 15 jury, the government knew all too well from its experience at the Holmes trial that Mr. Tolbert’s
 16 testimony did not match the truth reflected on the tape. But this time, there was no tape for the
 17 jury to use to evaluate Tolbert’s incorrect testimony, nor did the government do anything to
 18 address what it knew to be inaccuracies. The government “knowingly elicited and then failed to
 19 correct false testimony” that was central to making its case. *Dow*, 729 F.3d at 1048.

20 Over two decades ago, the Ninth Circuit, sitting en banc, directed prosecutors to stop
 21 engaging in “schemes to place false or distorted evidence before a jury.” *Hayes*, 399 F.3d at 988.
 22 “Our criminal justice system depends on the integrity of the attorneys who present their cases to
 23 the jury.” *Id.* Despite *Hayes*, here is yet another case where a prosecutor obtained a conviction
 24 through “deceptive means,” thereby “weaken[ing]” “the entire foundation of our system of
 25 justice.” *Id.* A court’s remedial powers in the face of such misconduct is broad, *see United States*
 26 *v. Kojayan*, 8 F.3d 1315, 1323-24 (9th Cir. 1993), and here, a sanction of reversal on all counts
 27 would likely be appropriate. As in *Hayes*, there is a substantial question whether acquittal is
 28 warranted in light of this error, and the Court should grant release pending the Ninth Circuit’s

1 resolution of that substantial question.

2 **4. The Denial Of The Motion To Suppress And An Instruction On**
 3 **Missing Evidence Poses A Substantial Question.**

4 The government's failure to preserve the LIS violated *United States v. Loud Hawk*, 628
 5 F.2d 1139 (9th Cir. 1979) (en banc), and *Arizona v. Youngblood*, 488 U.S. 51 (1988). Indeed,
 6 evidence the government itself offered in Mr. Balwani's trial showed that, in response to an IT
 7 specialist identifying potential ways to preserve that critical evidence, the same prosecutors who
 8 tried this case elected to ignore two approaches that unrebutted defense expert testimony at trial
 9 showed would have worked to obtain the LIS data. Tr. 6788-89, 6819-21; TX 5943; TX 20832.
 10 According to the unrebutted expert testimony of Richard Sonnier, the same approaches the
 11 government chose not to pursue would have led to access to the LIS data. *E.g.*, Tr. 6821. The
 12 Court thus erred in denying Mr. Balwani's motion to suppress¹¹ evidence supporting alleged
 13 deficiencies with Theranos' clinical testing—which Mr. Balwani could not adequately rebut
 14 without the LIS data. *See* Dkt. 1326 at 30-37.¹²

15 At a minimum, the Court erred in denying Mr. Balwani's requested instruction on missing
 16 evidence. *See* Tr. 6887. The Ninth Circuit has squarely held that bad faith is not required for a
 17 remedial instruction based on missing evidence. *See, e.g., United States v. Sivilla*, 714 F.3d 1168,
 18 1170 (9th Cir. 2013). Nor is it dispositive under the Ninth Circuit's multi-factor test whether "the
 19 evidence was lost or destroyed while in the government's custody." *United States v. Robertson*,
 20 895 F.3d 1206, 1213 (9th Cir. 2018). Had either of these motions been resolved in Mr. Balwani's
 21 favor, the jury would likely have acquitted on all counts. With almost all the government's
 22 evidence of deficiencies with Theranos' clinical testing suppressed, the government would have
 23 been unable to prove the core allegation underlying both the investor counts and patient counts—
 24 that Theranos' technology did not work.¹³ The same would have been true had the jury been

25 ¹¹ The Court also erred in denying Mr. Balwani's request for an evidentiary hearing.

26 ¹² In briefing before and during trial, the government repeatedly insinuated that Mr. Balwani was
 27 somehow involved in, and responsible for, the decision to disassemble the LIS system. *See, e.g.,*
 28 Dkts. 682 at 3-9, 1181 at 29, 1440 at 12-13. But when given the chance to substantiate its claims
 at trial, the government elected not to do so.

¹³ The unavailability of the LIS data also eliminated any chance to independently corroborate key
 evidence of Mr. Balwani's intent: that his own family members relied on Theranos' technology

1 instructed, as Mr. Balwani asked, that a finding of government negligence or recklessness in
2 preserving LIS could justify an inference that the data would be unfavorable to the government.

3 **5. The Admissibility Of Evidence On Dr. Rosendorff's Bias Is a**
4 **Substantial Question.**

5 The right to cross-examine a government witness about potential bias is at the core of the
6 Confrontation Clause's guarantee. *See United States v. Alvarez-Lopez*, 559 F.2d 1155, 1160 (9th
7 Cir. 1977). There is a substantial question whether the Court denied that right when it prohibited
8 the defense from questioning Dr. Rosendorff about his bias to paint himself in a positive light and
9 disassociate himself from Theranos due to regulatory issues at each of his three post-Theranos
10 employers. *See* Tr. 3216; Dkts. 1401, 1407. The Ninth Circuit has found it impossible to
11 "overemphasize the importance of allowing full and fair cross-examination of government
12 witnesses" when their bias is at issue, and "[f]ull disclosure of all relevant information concerning
13 their past record and activities through cross-examination ... is indisputably in the interests of
14 justice." *United States v. Brooke*, 4 F.3d 1480, 1489 (9th Cir. 1993). Yet the Court barred
15 Mr. Balwani from any inquiry—an even sharper limitation than it imposed on Ms. Holmes.

16 Resolving this substantial question in Mr. Balwani's favor would likely lead to a new trial
17 on all counts. The government referred to him by name more than 100 times during closing
18 arguments—more than any other witness. *See* Tr. 6938-7086, 7576-7685. Dr. Rosendorff's
19 testimony was crucial to determining the accuracy of Theranos' technology, Mr. Balwani's
20 knowledge of alleged deficiencies in that technology, and his attitude toward regulatory
21 compliance—issues that were core to all counts. It is fairly debatable whether the Court erred
22 when it denied Mr. Balwani the opportunity to confront fully a key government witness.

23 **6. The Denial Of A New Trial Or Evidentiary Hearing Based On**
24 **Dr. Rosendorff's Post-Trial Conduct Poses A Substantial Question.**

25 Dr. Rosendorff's centrality to Mr. Balwani's trial also underscores the significance of the
26 Court's denying Mr. Balwani's motion for a new trial—or even the same chance that Ms. Holmes
27 had to participate in an evidentiary hearing about Dr. Rosendorff's unprecedented post-trial

28 and testing services for diagnostic purposes. While one of Mr. Balwani's family members has
stated, for instance, that she saw Mr. Balwani's mother receive a fingerstick test, Dkt. 1668-3,
at 54, any corroboration of that would have been housed in the LIS data.

1 conduct in visiting Ms. Holmes and expressing concerns about his testimony to her partner, Billy
 2 Evans. *See* Dkt. 1599. The Court’s reasoning turned on distinguishing between Ms. Holmes (who
 3 was granted a hearing) and Mr. Balwani (who was not). But there was no basis—in
 4 Dr. Rosendorff’s trial testimony or his statements to Mr. Evans—to distinguish between the co-
 5 defendants for purposes of evaluating Dr. Rosendorff’s post-trial conduct. *Compare* Dkt. 1599 at
 6 2, *with* Dkt. 1587-1.

7 Dr. Rosendorff’s testimony at the Holmes evidentiary hearing did not undermine any of
 8 Mr. Evans’ statements, thus warranting a new trial. *See United States v. Mendez*, 619 F. App’x
 9 644, 646 (9th Cir. 2015). At the least, reasonable judges could fairly debate whether Mr. Balwani
 10 should have been denied the hearing that Ms. Holmes was afforded. The denial thus raises a
 11 substantial question that, resolved favorably, would likely lead to a new trial on all counts.

12 **7. The Admissibility Of Evidence On Alleged Misrepresentations To The**
 13 **Department Of Defense Is A Substantial Question.**

14 The indictment nowhere charges Mr. Balwani with defrauding the military. And the
 15 government nowhere provided written notice under Federal Rule of Evidence 404(b)(3) of its
 16 intention to offer evidence that Mr. Balwani or Ms. Holmes misrepresented facts to the military.
 17 *See* Dkt. 1396 at 6-10. The Court, however, admitted evidence of alleged misrepresentations in
 18 materials Theranos provided to the military. *See* Tr. 2489. That was classic propensity evidence
 19 aimed at showing that the defendants were liars: they misrepresented facts to the military, so they
 20 must have misrepresented facts to investors. Indeed, that is precisely how the government framed
 21 the evidence in closing. Tr. 7026-27. This is a textbook example of a “crime, wrong, or act” that
 22 “is not admissible to prove a person’s character.” Fed. R. Evid. 404(b)(1). The Court’s ruling
 23 transgressed Rule 404(b), as well as *United States v. Hill*, 953 F.2d 452, 456 (9th Cir. 1991) and
 24 *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1012 (9th Cir. 1995). Had this issue been
 25 resolved in Mr. Balwani’s favor, Mr. Balwani likely would have been acquitted of the investor
 26 counts. And acquittal on those counts would likely have led to either a sentence of no
 27 incarceration or one of shorter duration than the appeal process.
 28

1 **8. The Standard Of Proof For Proving Loss At Sentencing, And Whether**
2 **The Government Met That Burden, Is A Substantial Question.**

3 In imposing a Guidelines sentence on Mr. Balwani, the Court relied on a range driven
4 largely by the \$121-million fraud loss that it calculated. *See* U.S.S.G. § 2B1.1(b) (24-point
5 enhancement). But there is a substantial question whether the Court applied an erroneous standard
6 of proof in calculating loss. Under *United States v. Lonich*, 23 F.4th 881, 915 (9th Cir. 2022), a
7 conspiracy conviction alone does not justify the preponderance-of-the-evidence standard when
8 “[t]he jury’s guilty verdicts do not compel the conclusion—or even plausibly demonstrate—that
9 the defendants through their criminal conduct were responsible for” the losses. In those
10 circumstances, and when loss would have a dramatic effect on the Guidelines range, the
11 government instead must present clear and convincing evidence. *See id.* at 910-16. Here, the
12 government did not carry its burden under either standard. And without the loss amount, the
13 resulting Guidelines range would have been 4-10 months. With that range, it is likely the Court
14 would have imposed either probation or a sentence shorter than the anticipated time for appeal.

15 **D. The Substantial Questions Would Result In A New Trial Or A Substantially**
16 **Reduced Sentence.**

17 The fourth prong in the § 3143(b)(1) analysis asks whether, assuming the substantial
18 questions Mr. Balwani raises are resolved in his favor, that determination would lead to reversal,
19 a new trial, or a substantially reduced sentence. *Handy*, 761 F.2d at 1280-81 (holding that this
20 prong is about the type of error asserted, not about the likelihood of success). For the reasons
21 described above, each of the first six errors undermined the verdict on all of the counts for which
22 imprisonment was imposed. *Supra* at §§ III.C.1-6. The last two undermined the investor counts,
23 *supra* at §§ III.C.7-8, and for the reasons just described, vacatur of those counts of conviction
24 would likely result in a sentence shorter than the anticipated time for appeal, *supra* at 18-19.
25 Taken individually or in combination, then, these errors satisfy § 3143(b)(1)’s fourth prong
26 because they are likely to result in one of the enumerated statutory remedies (a new trial, a non-
27 custodial sentence, or a sentence shorter than the expected time for appeal).
28

E. The Court Should Stay Surrender Pending Resolution Of This Motion And Any Appellate Motion, If Necessary.

At sentencing, the Court set Mr. Balwani's surrender for March 15, 2023. In light of this pending motion, Mr. Balwani respectfully requests that the Court stay his surrender at least until it is able to resolve this motion. Should the Court deny this motion, Mr. Balwani intends immediately to move the Ninth Circuit for release pending appeal. *See* Fed. R. App. P. 9(b). The filing of a motion in the Court of Appeals stays a defendant's surrender until that Court can resolve his appellate motion. 9th Cir. R. 9-1(e) ("If the appellant is on bail at the time the motion is filed in this Court, that bail will remain in effect until the Court rules on the motion."). Although this stay is imposed automatically by operation of law, Mr. Balwani requests that the Court acknowledge and impose the stay for the avoidance of any doubt. *See, e.g., United States v. Fuentes*, 946 F.2d 621, 622 (9th Cir. 1991); *United States v. Kakkar*, No. 5:13-cr-00736-EJD, 2017 WL 4163291, at *1 (N.D. Cal. Sept. 20, 2017).

IV. CONCLUSION

Mr. Balwani respectfully requests that the Court grant this motion.

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Respectfully submitted,

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